No. 89-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal jus-

tice. Consequently, the NACDL has a vital interest in seeing that the proper balance is struck between the right to a fair trial and the first amendment rights of attorneys, a balance which affects not only litigants and lawyers, but the general public and our system of justice.

This case presents those issues in an unusually straight-forward context with a clear record. For these reasons, NACDL appeared as amicus in the proceedings below and does so before this Court as well.[1]

SUMMARY OF ARGUMENT

Criminal defense lawyers, through public discussion of pending criminal cases, frequently present a point of view on official conduct and political and civil liberty issues, that otherwise would not be heard. In addition to advancing the public's first amendment right to information concerning the judicial system, such speech fulfills the attorney's own first amendment rights and the first amendment right of his or her client.

Given the substantial interests affected by professional ethical regulations which restrict defense attorneys speech, such regulations must satisfy a three part narrowly drawn means test to be valid and such regulations can only be justified by the state's interest in insuring a fair trial. This demanding test is especially appropriate when applied to restrictions which might chill defense counsel speech because such attorneys are particularly vulnerable to selective enforcement of such regulations.

When measured against this test and the related considerations, the professional regulation of attorney speech in the present case must be declared invalid.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.3 of the Rules of this Court.

ARGUMENT

I. PROFESSIONAL ETHICAL REGULATIONS WHICH RESTRICT DEFENSE ATTORNEYS' PUBLIC DISCUSSION OF CRIMINAL CASES JEOPARDIZE SUBSTANTIAL FIRST AMENDMENT INTERESTS OF THE PUBLIC, THE ATTORNEY AND THE DEFENDANT.

Restrictions on trial publicity affect three separate interests: (1) the public's interest in pending criminal trials, by limiting the available flow of information; (2) an attorney's right to engage in politically and socially important speec' ; and (3) the interest of the accused in associating with the spokesperson of his or her choice.

Such restrictions are especially harmful when applied to lawyers representing criminal defendants because criminal defense lawyers have a special role in advancing the first amendment interests of the public. The lawyer for an accused will frequently represent an unpopular or minority view, or a view critical of public officials or official conduct, for which there may be no other realistic source of information. If the defense attorney is not free to provide the perspective of the minority or less powerful view, that view may never be heard.

A. The Public's Interest In Learning About Pending Criminal Cases Is Of Significant Constitutional Magnitude.

This Court has firmly and consistently established that the operation of the judicial branch of government is emphatically the public's business and that limitations on the transmission of information about matters occurring in the judicial system, especially the criminal justice system, are permissible only under the narrowest of circumstances. The right of contemporaneous public access to information about the judicial system was first recognized in *Bridges v. California*, 314 U.S. 252 (1941), where this Court stated that proscriptions on "utter-

ances made during the pendency of a case . . . produce their restrictive results at the precise time when public interest . . . would naturally be at its height [and are] likely to fall . . . upon the most important topics of discussion." *Id.* at 268. *See also, Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) ("Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.")

More recently, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), the Court noted the "special protection" granted to the distribution of information about criminal proceedings, and that First Amendment interests "should have particular force as applied to reporting of criminal proceedings." *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

The importance of public access to information about the criminal justice system was once more recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where Chief Justice Burger stated, "'The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.'" *Id.* at 575-76 (plurality opinion by Burger, C.J., quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).[2]

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[2] Interests identified by the Chief Justice as being served by opening the "stock of information" include integrity of the trial, *id.* at 578 (*see also, id.* at 596 (Brennan, J., concurring); *id.* at 600 (Stewart, J., concurring)), public confidence and the appearance of justice, *id.* at 571-72 (*see also, id.* at 594-95 (Brennan, J., concurring)), and the therapeutic value inherent in "providing an outlet for community concern, hostility, and emotion." *Id.* at 571. In furtherance of these goals, this Court has afforded constitutional protection to publication of information gained at open criminal proceedings, *Nebraska Press Association, supra*, from public records of the criminal courts, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), and even from otherwise confidential official investigations. *Landmark Communications, supra.*

The public's interest in obtaining a full flow of information about the operation of the criminal justice system, and the conduct of the government officials who populate and direct the system, is advanced in particularly important ways by criminal defense lawyers. Lawyers who represent persons accused of crime frequently represent a perspective on official conduct and political and civil liberties issues that otherwise is unavailable.

For example, criticism of the judiciary, even in the handling of a particular trial, is important to public oversight of the system and is within an attorney's rights and possibly even obligations. *In re Sawyer*, 360 U.S. 622, 629-30, 636 (1959); *id.* at 647 (Stewart, J., concurring); *id.* at 669 (Frankfurter, J., dissenting). Alerting the general public that a prosecution may be motivated by political pressure provides potential jurors with information to assist their understanding of the judicial process and to help them serve their function as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Similarly, disclosure of events which occur between arrest and trial increases the probability that the police will do their work properly, protecting the rights of both the accused and the public.

The role of defense lawyers in advancing the public's interest in obtaining a full flow of information concerning the legal system extends beyond providing information about the criminal justice process. *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253-254 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (recognizing legitimate functions fulfilled by defense counsel speech). Criminal cases often raise broader public policy issues about the legitimate scope and enforcement of the criminal law. For example, the desirability of jailing officials of companies that pollute the environment is a legitimate matter of general public concern about which defense lawyers can provide a unique perspective. *See*

"Increasingly, A Prison Term is the Price Paid by Polluters," *New York Times*, February 15, 1991, p. A1. So, too, the issue of abortion, one of the major public issues of our day, is more completely understood when the perspective of the criminal defense bar is included. *See* "Adultery as a Crime: Old Law Dusted Off in a Wisconsin Can," *New York Times*, April 30, 1990, p. A1.

The recognized right of the public to information about criminal proceedings, and the role of the defense bar in furthering that interest, is significantly affected by ethical proscriptions against attorney speech concerning criminal cases. For example, assurance of the integrity of the proceedings, which can be served through dissemination of information by defense counsel, is undermined by restrictions on defense counsel speech. Most defense attorneys will be reluctant to express criticism of the public justice system, either generally or in a particular case, if the attorney knows that by doing so he or she may well be subject to professional discipline.

The chilling effect of professional regulations limiting attorney speech is especially great for criminal defense lawyers. Criminal defense attorneys often practice alone, or in small firms, and are particularly dependent upon their reputations to meet the constant need for new business. As such, the threat of professional discipline and related sanctions carry significant economic consequences both because of the costs to defend against such charges and the resulting loss of reputation and income if charges are sustained. Further, as the spokesperson for unpopular clients, constantly facing off against public officials, a criminal defense attorney will understandably be concerned about discriminatory enforcement of such regulations. *See e.g., Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976) *aff'd in part and rev'd in part sub nom. Hirschkop v. Snead*, 594 F. 2d 356 (4th Cir. 1979) (en banc) (State Bar admits that the complaints brought against an attorney who regularly represented unpopular clients and causes "were meritless").

While professional regulations thus chill publicly valuable speech by criminal defense lawyers critical of the mainstream view, such regulations seem to have little or no effect on comments by public officials and law enforcement agents. In fact, those participants who assist the press in creating fair trial problems in high publicity cases most often are police officials, prosecutors, and judges. *See, Sheppard v. Maxwell*, 384 U.S. 333, 338, 339, 342 (1966); *Irvin v. Dowd*, 366 U.S. 717, 725-27 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), *cert. denied*, 372 U.S. 987 (1963); *Fouquette v. Bernard*, 198 F.2d 96, 99 (9th Cir. 1952); Friendly & Goldfarb, *Crime and Publicity* 247 (1967); *Gillmor, Free Press and Fair Trial* 43, 92, 95-96, 101, 111-12, 181-83 (1966); Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. Rev. 504, 520 (1965); McCarthy, *Fair Trial and Prejudicial Publicity*, 17 Hastings L.J. 79, 96 (1965).

The press of course is free to report the facts of crimes and criminal prosecutions, but the press is not always informed, either through access or training, in a way which makes their reporting meaningful and accurate. *See, Nebraska Press, supra*, at 587 n.14 (Brennan, J., concurring). While the press can report the facts, lawyers can interpret their significance. Lawyers can explain confusing technicalities and provide information to the press concerning police conduct, judicial oversight of police activity, prosecutorial decisions, the implication of others in the alleged criminal conduct and action taken concerning them, political and social issues inherent in the litigation, and specific or general deficiencies in the criminal justice system. *Nebraska Press, supra*, at 605-06 (Brennan, J., concurring). Becaues lawyers are knowledgeable insiders their access to this type of information is greater than that of the press or the general public.

Furthermore, defense attorneys employed for the purpose of representing a client's interests have a strong motivation to become particularly knowledgeable about the facts of the case and the applicable law. As a result, defense attorneys are in an especially valuable position to advocate necessary reform and a pending criminal trial provides a unique opportunity to do so. When lawyers make speeches to bar associations only lawyers hear. When lawyers talk to the press about newsworthy matters on which public attention has been focused, the public hears and the value of public access to information about the criminal justice system is served.

B. The Defense Attorney Has Important Personal First Amendment Interests In Discussing Pending Criminal Cases.

Lawyers have a unique role in our society in their interest in the social and political issues of the day, and an attorney's interest in such issues often is the very reason he or she will undertake the defense of an accused. "It is the glory . . . of the bar that . . . would-be tyrants and oppressors of mankind find the elimination of a free and fearless legal profession a necessary first step in the carrying out of their plans." Editorial, *"Let's Kill All the Lawyers!,"* 34 J. AM. JUD. SOC'Y 35 (1950). The opportunity to represent a client precisely because the attorney agrees with the political or social views of that client is an associational right necessary to fulfillment of the protective role of the legal profession.

At the same time, a lawyer involved in litigation should not be denied the opportunity to express his or her own views on those same political and social issues. To the extent that such expression overlaps issues presented in the case, however, the existence of professional regulation of the attorney's speech, and the potential for sanctions, present a significant chill. Professional regulation, consequently, may force that attorney to choose between two constitutionally protected methods of advancing his

or her political beliefs. Should the attorney choose to represent the client, the attorney may be forced to forego his or her own right to express political views. Should the attorney choose to speak his or her mind, the attorney may be forced to forego advancement of his or her social and political interests through client representation.

C. The Accused Has Significant First Amendment Interests In Discussion Of The Case By His Attorney.

The accused's right of representation also may be disserved by restrictions on the defense attorney's speech. The criminal defendant, presumed by our law to be innocent, is made to suffer the consequences of an accusation of misconduct by an official entity of the government. The accused's reputation and self-respect can be destroyed; his or her family is made to suffer; the accused is forced to face his fellow citizens wearing a stigma of wrongdoing. Silence may well result in the existence of an anti-defense bias in the community from which the jury will be selected. Other more general biases concerning attitudes toward criminals, racism and social and political values also may exist in the community. Thus, rather than interfering with a fair trial, the right of a defendant to provide information necessary to overcome already existing biases may be essential to its maintenance.

Criminal trials also are expensive. In an increasing number of cases, especially those in which either the crime or the prosecution has political overtones, the defense has found it necessary to request contributions from the publice. Garry & Riordan, *Gag Orders: Cui Bono?*, 29 Stan. L. Rev. 575, 581 (1977). Obtaining such a defense fund will depend, to a large extent, on the defendant's ability, with his attorney as spokesperson, to convince potential contributors of his innocence.

An innocent defendant may need to speak out, through his or her attorney, to guard against the miscarriage of justice. The "political" responsibility of the jury to serve as a check upon the judge and prosecutor, as well

as to function as the conscience of the community in ensuring morally and socially appropriate enforcement of the law requires that the jury bring information with it to the trial. A primary source of such information must be the accused.

A criminal defendant, however, often is not articulate or informed and may wish to exercise his right to hire another to advance his interests and adopt as his own "the words used by his more fluent or learned friend on his behalf." Christian, *A Short History of Solicitors* 3 (1896). The client may also be in jail, subject to a substantial limitation on his ability to speak out. Reliance on his attorney may be his only effective means of bringing his plight to the attention of the public.

II. PROFESSIONAL ETHICAL REGULATIONS WHICH INFRINGE THE FOREGOING FIRST AMENDMENT RIGHTS MUST BE SUPPORTED BY A COMPELLING GOVERNMENTAL INTEREST, MUST BE PRECISELY DRAWN, MUST BE EMPIRICALLY DEMONSTRATED TO HAVE A NEXUS TO THE ASSERTED EVIL, AND MUST BE THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING THE GOVERNMENTAL GOAL.

This Court has established a most stringent constitutional test, "strict scrutiny", as the appropriate standard for evaluating restrictions on public access to information about criminal trials. "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Such a demanding test is particularly appropriate when applied to ethical proscription on attorneys speech, given the important first amendment role filled by defense counsel and their vulnerability to discipline.

The requirement that a restriction on first amendment interests be closely tailored to achieving the compelling

governmental goal implicates three factors. First, it mandates an unusually high degree of precision in draftsmanship. Second, it requires that the means chosen must bear a demonstrable relationship to the furtherance of the asserted goal. Third, there must be no alternative means of achieving the goal which is less restrictive of otherwise protected expression.

A. Regulations Suppressing Discussion Of Pending Criminal Proceedings Must Be Drawn With Narrow Specificity.

The specificity requirement reflects a recognition that there often is a fine line between legitimate and illegitimate speech, and thus mandates that the regulation "will accomplish the pinpointed objective permitted." *Carroll v. President of Princess Anne*, 393 U.S. 175, 183 (1968). A broad regulation may prevent protected speech either by restricting expression which is not harmful, or by chilling expression which is not clearly subject to or excluded from the regulation. *See, e.g., Nebraska Press*, 427 U.S. at 567 (trial court's order restraining pretrial publication of evidence invalidated in part because of the failure of the judge "to predict what information [would] in fact undermine the impartiality of jurors, and [to draft] an order that [would] effectively keep prejudicial information from prospective jurors."); *see also id.* at 571-72 (Powell, J., concurring).

This principle has been applied to professional attorney regulations which implicate First Amendment values. In *NAACP v. Button*, the Court struck down a broadly worded professional regulation, noting that the broad language would cause "[l]awyers [to] understandably hesitate . . . to do what the [statute] purports to allow," and lent itself "to selective enforcement against unpopular causes." 371 U.S. 415, 434, 435 (1963). Similarly, in *In re Primus* a disciplinary rule was struck down because it had a broad sweep and "distinct potential for dampening" protected expression. 436 U.S. 412, 437-38 (1978). Indeed, even regulation of attorney speech proposing

purely commercial transactions may not be broadly worded. *In re R.M.J.*, 455 U.S. 191, 203 (1982). Thus, professional proscriptions on attorney discussion of pending litigation must be precisely worded, providing specific notice of the expression which may be sanctioned.

B. There Must Be An Empirically Demonstrable Nexus Between The Means Used And The End Sought To Be Achieved.

The second prong of the closely tailored means requirement is the necessity that the nexus between the means chosen and the ultimate goal be empirically demonstrable, rather than speculative or conjectural. This requirement is common in trial publicity litigation. In the early contempt cases, the Court examined the record to determine whether the facts supported the conclusion that the integrity of the system was truly threatened. *Wood v. Georgia*, 370 U.S. 375, 387 (1962); *Craig v. Harney*, 331 U.S. 367, 373 (1947); *Pennekamp, supra*, at 335; *Bridges, supra*, at 271; *see also In re Sawyer, supra*, at 628. The publication restraint in *Nebraska Press* was struck down in part because "[the trial judge's] conclusion as to the impact of [the] publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable." 427 U.S. at 563.

The more recent progeny of *Richmond Newspapers* have applied this principle as well. In *Globe Newspaper, supra*, the Court expressed no view as to whether an asserted governmental interest was sufficiently compelling to meet the goal element of the constitutional test, but made clear that the test could not be saisfied where he connection between the means and the ends was speculative. 457 U.S. at 607. Again in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), although the goals were accepted as compelling, a nexus between those goals and the information limitation was not established "by findings showing that an open proceeding *in fact* threatened those interests." *Id.* at 510-11 (emphasis added). Thus, the Court held that restrictions on the

first amendment right of the public to learn about a criminal trial must be supported not only by a compelling interest but also by a demonstration that interest is truly at risk.

C. Restrictions On Speech About Pending Criminal Cases Are Invalid If A Less Restrict Alternative Is Available.

The access restrictions at issue in *Globe Newspaper* and *Press-Enterprise* were also rejected because there existed a less restrictive way to achieve the goals asserted by the State. In *Globe Newspaper*, the Court pointed out that even when the goal is compelling, if it can be met through an *ad hoc* application of restrictions designed to fit the particular case, rather than generally applicable restrictions, the former must be used. 457 U.S. at 607-08. The same approach was used in *Press-Enterprise* where the State sought to justify closure of the jury selection process by asserting the need to protect the privacy of jurors. Although accepting that juror privacy might in some cases be a compelling interest, the Court pointed out that a case-by-case evaluation of particular requests for privacy was an available means to accomplish the goal. 464 U.S. at 513.

This required use of an *ad hoc* examination of alternatives is not a new concept in cases involving access to information about criminal trials. In *Nebraska Press*, for example, a substantial ground for rejection of the publication restraint was the failure of the trial court to consider trial protective alternatives. 427 U.S. at 563-64; *see also Richmond Newspapers*, 448 U.S. at 580-81.

In sum, there is a consistent pattern in this Court's approach to restrictions on the flow of information to the public about criminal cases. Even when the purpose of the restriction is compelling, broadly worded regulations of general application, which have no empirically demonstrated nexus to the goal, and for which a less restrictive case-specific alternative exists, may not be used.

III. THE SOLE SOCIETAL INTEREST WHICH JUSTIFY LIMITATIONS ON THE DISSEMINATION OF INFORMATION ABOUT CRIMINAL TRIALS IS INTERFERENCE WITH THE FAIRNESS OF THE TRIAL.

The two interests asserted by the profession in support of its regulations on trial publicity are trial fairness and the fiduciary and professional obligations of attorneys as officers of the court. *A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Recommendations of the Advisory Committee on Fair Trial and Free Press* 80, 82, 92-93 (Tentative Draft 1966) ["Reardon Report"]); *Association of the Bar of the City of New York, Special Committee on Radio, Television and the Administration of Justice, Freedom of the Press and Fair Trial* 24 (Final Report with Recommendations 1967) ["Medina Report"]). Only the first of these considerations can justify professional sanctions on defense attorneys.

A. Protection Of The Fairness Of The Trial Is An Interest Of Compelling Constitutional Magnitude, But Is Not Easily Satisfied.

Guaranteeing a fair trial both for the accused and for the state unquestionably is a societal interest of constitutional magnitude, sufficiently compelling to outweigh even core first amendment interests. It is necessary, however, to carefully identify and describe this interest since all trial publicity is not necessarily harmful. *Nebraska Press, supra,* at 554. The dangers against which the system must be on guard in that "the conclusions . . . reached in a case will be induced . . . by . . . outside influence," *Patterson v. Colorado,* 205 U.S. 454, 462 (1907), that the trial will "be won through the use of the meeting hall, the radio, and the newspaper," *Bridges, supra,* at 271, and "that the jury's verdict be based on . . . outside sources." *Sheppard, supra,* at 351. It is the protection of the legitimacy of the ultimate decision, and

not such broad and nebulous interests as "the due and proper administration of justice," *Medina Report, supra,* at 24, which provides the compelling interest.

Application of sixth amendment standards of jury impartiality suggests that the instances in which trial publicity will invalidate a trial are infrequent if not rare. *Nebraska Press, supra,* at 551. Pretrial publication of the accused's confession is not always sufficient. *See, Stroble v. California,* 343 U.S. 181 (1952). Knowledge by the jury that the accused previously has been convicted of another serious crime is also not necessarily so prejudicial as to destroy impartiality. *See, Murphy v. Florida,* 421 U.S. 794, 801 n.5, 802 (1975). This Court's decisions in the area appear to demand evidence of "a sustained excitement and . . . a strong prejudice among the people," *Murphy, supra,* at 726, that would "so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press, supra,* at 569. This is the standard against which the publicity must be measured and the validity of professional regulations judged where trial protection is the asserted goal.

B. The Fiduciary And Professional Obligations Of Attorneys, Standing Alone, Do Not Constitute A Compelling Governmental Interest.

An individual's status as an attorney, a school teacher, *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968), a student, *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 511 (1969), or a prison inmate, *Procunier v. Martinez,* 416 U.S. 396, 409 (1974), does not mandate a shedding of expressive rights. The Court has consistently rejected such a "status" justification in cases presenting first amendment activities by attorneys. *NAACP v. Button,* 371 U.S. 415 (1963), for example, rejected the view that the associational activities of attorneys were subject to

greater than normal regulation. Only a specific state interest independent of the attorney's status could justify the imposition of sanctions. A similar result was reached in *In re Primus*, 436 U.S. 412 (1978), requiring a showing of actual harm to justify prohibition and sanctioning of solicitation activities.

Federal and state courts have all consistently concluded that an attorney's status as officer of the court, standing alone, is insufficient to justify sanctions. The United States Courts of Appeal for the Fourth and Seventh Circuits, the Supreme Court of Montana, the Appellate Division of the New York Supreme Court, and a California appellate court have all insisted that some showing of a danger to the fairness of the trial, rather than mere status as an attorney, is necessary to override the first amendment interests in attorney publicity about pending proceedings. *Hirshkop v. Snead*, 594 F.2d 356, 363 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975); *In re Keller*, 693 P.2d 1211 (Mont. 1984); *Markfield v. The Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 337 N.E. 2d 612, 375 N.Y.S.2d 106 (1975); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

Rejection of a status based justification for suppression of attorney speech is supported by two considerations. First, although an attorney is an officer of the court, his or her role differs considerably from that of other court officers such as marshals, bailiffs and court clerks. Unlike those officers, an attorney is neither the servant nor the employee of the court, *Spevack v. Klein*, 385 U.S. 511, 520 (1967) (Fortas, J., concurring), and has significant professional obligations upon which he or she must make independent judgments. *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

Second, limiting the description of an attorney to that of assistant to the court in resolving disputes as antithetical to the lawyer's equally important responsibility to ensure the integrity of the judicial system. Attorneys play a major role in protecting society against misconduct in the judicial process, *In re Sawyer*, *supra*, and are charged with the responsibility to represent the public's interest in integrity during the pendency of legal proceedings. *Gannett Co. v. Pasquale*, 443 U.S. 368, 384 (1979). Any authority residing in the state to silence attorneys, merely because they are attorneys, is inconsistent with those charges and obligations.

IV. PROFESSIONAL ETHICAL REGULATION OF DISCUSSION OF CRIMINAL CASES FAILS ALL THREE PARTS OF THE NARROWLY TAILORED MEANS TEST.

Current professional regulation of defense attorney discussion of pending criminal cases is not justified by even the compelling governmental interest in protecting trial fairness. This is because such regulations are not narrowly tailored to meet that goal. The regulations must be measured against three requirements: precision of regulation; empirically demonstrable nexus; and less restrictive alternative.

A. Professional Regulations Concerning Trial Publicity Are Broadly Worded, Imprecise Generalities Which Do Not Adequately Alert The Attorney Of The Line Between Proscribed And Permitted Discussion.

The threat of professional sanctions and the possible loss of professional standing, professional reputation, and of livelihood are consequences which any attorney would, and should be loath to risk. The compulsion toward silence generated by professional regulations is especially significant because the relinquished privilege is not of particular professional or personal importance to the lawyer, but at the same time, it is a fundamental societal interest. With little to gain, and much at risk, a lawyer confronted

with a broadly worded regulation might "understandably hesitate", *Button*, *supra*, at 434, before publicizing that which he or she perceived to be an impropriety within the system.

Furthermore, unlike a generally applicable criminal statute, professional regulations are specifically focused on a sharply identified class of citizens. A lawyer participating in a criminal trial is well aware that the rules concerning trial publicity are applicable and that a possible violation will be personally dangerous. This combination of high risk, lack of inclination, and focused application all argue for uniquely precise regulation to protect the public interest.

An examination of the most recent effort by the American Bar Association to draft a publicity regulation, Rule 3.6 of the Model Rules of Professional Conduct, adopted by the Association's House of Delegates in 1983, *see Summary of Action Taken by the House of Delegates of the A.B.A.*, 10-11 (Annual Meeting—August 2-3, 1983), demonstrates that the required precision of regulation simply is not present. That rules provides, in part:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:
>
> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

These provisions alert an attorney that he may be subject to discipline for making a statement which refers to a criminal matter, is a statement which a reasonable person would expect to be published by the media and relates information he reasonably should know that, if disclosed, would create a substantial risk of prejudicing an impartial jury; such a statement is grounds for discipline simply because it is deemed that such a statement ordinarily will have a substantial likelihood of prejudicing an adjudicative proceeding. The provision that such a statement "ordinarily" would be sanctionable leaves the burden on the attorney to demonstrate that his statement was made in an extraordinary situation.

Such language hardly provides the attorney with a precise statement of the line between publicity which he has a "special responsibility to exercise fearlessness" in disseminating, *Sawyer*, *supra*, at 669 (Frankfurter, J., dissenting), and that which may cause his dismissal from the profession. It will be the rare individual who would not choose to err on the side of caution, particularly since silence carries no risk—professional regulations provide no sanction for failure to publicize that which the public has a strong interest in knowing.

B. There Is No Empirically Demonstrable Nexus Between Regulations Proscribing Trial Publicity By Defense Attorneys And The Government's Interest In Fair Trials.

The empirically demonstrable nexus requirement mandates a showing of a real danger that trial publicity by defense attorneys presents a threat to the fairness of criminal trials. In fact, there has never been a case in which defense counsel publicity was found to have interfered with a fair trial.

The Reardon Report, *supra*, upon which the American Bar Association relied in adopting Model Rule 3.6 and its

predecessor DR 7-107 of the Code of Professional Responsibility, cites two cases which it asserts justify regulation of defense attorney trial publicity. In the first, *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963) (en banc), *cert. denied*, 372 U.S. 978 (1963), the Court of Appeals for the Second Circuit, sitting en banc, concluded that the destruction of trial fairness was caused by improper publicity emanating from the prosecution; the court expressly rejected the state's assertion that publicity by defense counsel had contributed to the constitutional violation. *Id.* at 372. The Reardon Report in its second illustration, *Sheppard v. Ohio*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956), relied upon a quotation from the brief of the State of Ohio accusing defense counsel of using the press to prejudice the State's case. Reardon Report, *supra*, at 42-43. Ten years later, however, when this Court struck down Sheppard's conviction, an extremely meticulous discussion of the facts of the trial and its attendant publicity never mentioned an instance of misconduct by counsel for the defense. *Sheppard v. Maxwell*, *supra*, at 335-49. Indeed, in its final report the Reardon Commission acknowledged that there was no available empirical data to support its conclusions. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Recommendations of the Advisory Committee on Fair Trial and Free Press* 16 (Approved Draft 1968).

The Medina Report, *supra*, cited four additional cases in support of its recommendation of publicity restraints on defense attorneys. One involved a public statement by defense counsel in a kidnapping prosecution that the alleged victim had engineered the kidnapping as a publicity stunt. *Id.* at 43-44. The ineffectiveness of this statement in prejudicing trial fairness is made evident by the fact that all defendants were convicted. N.Y. Times, March 8, 1964, at 1, col. 1.

The next case relied upon by the Medina Report is *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421, *cert. denied*, 364 U.S. 290 (1960). *See Medina Report*, *supra*, at 44-45. The issue raised in that case was media involvement in the trial, *Grimes*, *supra*, at 77, 114 S.E.2d at 423, not defense publicity. Although the facts as stated by the Georgia Supreme Court indicate that defense counsel twice made statements to the press, *id.* at 80-81, 114 S.E.2d at 425-26, neither that court nor the trial court appeared concerned in any way with, or perceived the case as involving excessive defense counsel publicity. Indeed, the only suggestion that *Grimes* was a "defense counsel publicity" case appeared in a five page student law review note which the Medina Report quoted considerably more extensively than it did the court's opinion. *Medina Report*, *supra*, at 44-45.

The remaining two illustrations cited by the Medina Report provide even less support for finding defense attorney impropriety. One was an espionage trial, prior to which radio stations had broadcast reports that the accused had been dishonorably discharged from the Air Force. Defense counsel permitted the accused to display his honorable discharge papers to the press, but made no statements himself. *Id.* at 45-46. In the other, defense counsel told the press that he could prove his client's innocence of certain of the charges, that the police were guilty of misconduct, that public officials should be accountable for injustices they commit, and that the accused maintained his innocence. A few days later the charges referred to were dropped. *Id.* at 48-50.

Another study by the American Bar Association Section of Criminal Law into the facts surrounding the trial of Bruno Richard Hauptmann, recommended "[t]hat broadcasting of arguments, giving out at argumentive [sic] press bulletins, and every other form of argument or discussion addressed to the public, by lawyers in the case during the progress of the litigation

be definitely forbidden." *A.B.A. Section of Criminal Law, Report of Special Committee on Publicity In Criminal Trials, reprinted in* Hallam, *Some Object Lessons On Publicity In Criminal Trials*, 24 Minn. L. Rev. 453, 507 (1940). An examination of the facts revealed a typically one sided media campaign by the prosecution team. Nonetheless, while the publicity campaign conducted by the prosecutor was extensive and clearly potentially damaging, *Hallam, supra*, at 501, the Committee apologized to the prosecutor for what it deemed "the necessity for criticism." *Id.* On the other hand, the sole statement made by defense counsel before sequestration of the jury was issued two days after counsel's appointment, was a general advisory comment that our system of law operates with a presumption of innocence, that a mere accusation of guilt is not proof of guilt, and that after a brief examination of the case the attorney was persuaded that his client was innocent. *Id.* at 498. Unlike it treatment of the prosecutor, however, the Committee suggested that it would have been appropriate for defense counsel to apologize for issuing statements to the press. *Id.* Ultimately, the New Jersey Supreme Court concluded that the jury had been adequately protected and consequently the publicity had not distorted the fairness of the trial, *State v. Hauptmann*, 115 N.J.L. 412, 445, 180 A. 809, 828, *cert. denied*, 296 U.S. 649 (1935), a conclusion in which the Committee concurred. *Hallam, supra*, at 479. The eventual execution of the accused suggests that defense counsel's publicity did not so interfere with the fairness of the trial as to deprive the state of its conviction.

In addition to the foregoing reports issued by the organized bar, three substantial studies of the problem of trial publicity have been independently conducted.[3] The

[3] Two law review articles were also cited by the Reardon Report, Jaffe, *Trial By Newspaper*, 40 N.Y.U. L. Rev. 504 (1965); McCarthy, *Fair Trial And Prejudicial Publicity: A Need For Reform*, 17 Hastings L.J. 79 (1965). *Reardon Report, supra*, at 76 n.212. Both indicate that the fair trial problem derives either from the release of information by public officials or diligent investigation by reporters. *Jaffe, supra*, at 504; *McCarthy, supra*, at 91. Neither cites an instance in which defense counsel engaged in excessive publicity.

primary value of these studies is their extensive research into and disclosure of large numbers of high publicity criminal cases. Professor Donald M. Gillmor, in *Free Press and Fair Trial* (1966), discusses close to 100 such cases, but finds only three, in addition to *Bloeth, supra*, and *Sheppard v. Ohio, supra*, in which there was even a claim of defense attorney publicity. Describing the first of these cases, Professor Gillmor states that "[d]efense attorneys, hopeful of a mistrial, were suspected of planting [a] story," reported in the press, that the defendants had offered to plead guilty. *Gillmor, supra*, at 45. No mistrial was granted and the subsequent conviction of five of the defendants was unanimously affirmed by the state supreme court.

Professor Gillmor's next illustration is the case of John Rexinger, who was accused of torture and rape. For nine days after his arrest the press, using information apparently obtained from the police, engaged in overwhelming character assassination. The sole statement by defense counsel was an announcement that the police had the wrong man, which was followed the next day by Rexinger's release and the arrest of another man. *Id.* at 50-54. Finally, Gillmor discusses Burton Abbott, who was charged with kidnapping and murder. Newspapers carried articles reporting statements by the victim's father, the police, the prosecutor and potential prosecution witnesses. After almost a month, defense counsel publicly took note of the circumstancial nature of the evidence—no motive, no weapon, no idea as to how and when the crime had been committeed and no proof of the method of abduction. This statement, true or not, clearly had no impact on the outcome of the trial since Abbott was convicted and executed. *Id.* at 54-56.

A second study examined the role of the media in the problem of trial publicity, but devotes a section to a discussion of attorney publicity. J. Lofton, *Justice And The Press* (1966). This discussion is devoted almost exclusively to publicity by prosecutor. *Id.* at 218-26. Only a few paragraphs refer to publicity by defense attorneys and disclose no instance in which defense attorney publicity had an impact on the outcome of the litigation. Indeed, the study points out that defense publicity occurs almost exclusively when the defendant has been the target of an attack by police and prosecutors in the press. *Id.* at 225-26.

A third independent examination, A. Friendly & J. Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* (1967), included a review of twenty notorious cases in which publicity was a real or potential difficultly in maintaining a fair trial. In all of these cases publicity by the news media was extensive and the study documents illustrations of publicity by eye witnesses, police officials, prosecutors, coroners, mayors, judges, United States Commissioners, Congressional committees, and even the President of the United States. *Id.* at 15-17, 19, 21-22, 166, 167 n.1, 172, 175-77, 178-79, 181-86, 190-91, 192 n.10. In this careful and detailed examination, however, not a single instance of arguably improper publicity by a defense attorney is cited; the authors recommend that defense counsel b excluded from publicity restrictions. *Id.* at 135-36, 247-48.

An additional category of authorities is a series of four cases in which this Court determined that trial fairness was destroyed by excessive publicity. *Sheppard v. Maxwell, supra; Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). Of the four only *Sheppard* even arguably involved defense publicity. Justice Clark's opinion for the Court devoted some thirteen pages to a description of the highlights of the attendant publicity, *Sheppard, supra*, at 337-49, placing substantial emphasis upon improper activities of the police, the Coroner, the

news media, and the actual conduct of the trial. *Id.* at 337-41, 342-49. In contrast, the opinion contains not a single specification of publicity, proper or improper, by defense counsel. Even *Sheppard* then provides no support for the assertion that there is empirical evidence that defense publicity interferes with trial fairness.

Finally, it is instructive to examine those instances in which professional disciplinary bodies concluded that defense attorneys had engaged in publicity which justified sanctions. *In re Sawyer, supra*, involved a defense attorney who was suspended from practice for having made a speech highly critical of the manner in which her client was being tried. This Court reversed the sanctions, holding that nothing said by Sawyer "tend[ed] to obstruct the administration of justice." 360 U.S. at 636; *id.* at 647 (Stewart, J., concurring). *Markfield, supra*, involved suspension proceedings brought against the defense attorney in a criminal trial arising out of a prison riot. The Appellate Division of the Supreme Court of New York struck down the disciplinary action, holding that Markfield's publicity did not constitute an interference with a fair trial. 49 A.D.2d at 517, 370 N.Y.S. at 85. *In re Keller, supra*, also rejected disciplinary action on the ground that the regulatory rule had been applied in a per se manner, with no demonstration that the publicity had impacted upon the trial. 693 P.2d at 1212-14. And in the very case now before the Court, there was a finding by the Nevada State Bar that Petitioner Gentile's statements did not actually interfere with the fairness of the trial.

Not a single instance of trial interference through publicity by a defense attorney has even been documented. The possibility that such publicity will actually conflict with the government interest in assuring trial fairness thus is necessarily a matter of conjecture and speculation, and cannot support an across-the-board interference with the flow of information to the public about pending trials.

C. A Judicial Silence Order, Based On Specific And Identified Facts And Designed To Meet The Fair Trial Demands Of A Particular Case, Is A Less Restrictive Means Of Protecting Trial Fairness From Harmful Extra-Judicial Publicity.

The lack of precision in the language of professional regulations, coupled with the inability to state with certainty that the problem they seek to address—at least with respect of defense counsel—is a real one, increases the importance of the third prong of the closely tailored means test. The strict scrutiny standard of review mandates a preference for restrictions that are limited to particular cases in which a need to protect the trial actually has been demonstrated, and that are carefully designed to withhold only so much information as is necessary to meet that need.

Numerous trial protective techniques exist, such as jury sequestration, change of venue, continuance, searching *voir dire* and cautionary instructions, none of which infringe on First Amendment rights and thus are to be preferred to speech restrictive remedies. *Nebraska Press, supra,* at 563-64, 601-03; *see Sheppard supra,* at 357-62. Once the jury has been empaneled, and sequestration is possible, there should never be a need for suppression of defense attorney speech to protect trial fairness. There may be a case where, prior to jury selection, none of the stated techniques will be available or sufficient to protect against extra-judicial publicity, even by the defense attorney. Even if such a case were to arise there is still an available alternative—a specifically tailored judicial order prohibiting described publicity.

Such an order would issue only after a judicial officer determined, at an adversarial hearing in which evidence of the nature and extent of existing publicity is presented and appropriate standards are applied, that there was a real need to suppress the information being disseminated by the defense attorney. The trial judge would then be in a position to narrowly tailor an order suppressing only

so much information as is determined necessary to protect the trial, and the attorney would not be left to speculate as to whether continued publicity would later be found to have violated a nebulous standard.

Examination of this Court's precedents on trial publicity suggests a strong preference for this approach. Justice Black, writing for the majority in *Bridges, supra,* stated that "an authoritative guide to the permissible scope of comment" was to be favored over imprecise, generalized regulatory techniques. 314 U.S. at 269. Justice Frankfurter, concurring in *Pennekamp, supra,* pointed out that "we cannot escape the exercise of judgment on the particular circumstances of the particular case." 328 U.S. at 367 (Frankfurter, J., concurring). In its listing of protective techniques which the trial judge might have used in *Sheppard, supra,* the Court stated that "the trial court might well have proscribed extrajudicial statements by any lawyer . . . which divulged prejudicial matters." 384 U.S. at 361. The holdings in both *Globe Newspaper, supra* and *Press-Enterprise, supra,* turned on this very point. In *Globe Newspaper* a mandatory closure rule was struck down because the governmental goal could have been achieved through a case by case determination of the need for protection. 457 U.S. at 607-08. Similarly, the closure in *Press-Enterprise* was held invalid because of the availability of the alternative of individualized evaluation of the interests asserted. 464 U.S. at 513.

Such an order, of course, could not issue unless a need to protect the trial was established "with the degree of certainty . . . cases on prior restraint require." *Nebraska Press, supra,* at 569. This is as it should be, since the first amendment interests in open discussion of criminal cases and the judicial system is great, and any suppression of the transmission of information about these issues is valid only when found clearly necessary. But "[t]he phrase 'prior restraint' is not a selfwielding sword. Nor can it serve as a talismanic test. * * * The generalization that prior restraint is particularly obnoxious in

civil liberty cases must yield to more particularistic analysis." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957).

In the context at bar, a narrowly drafted judicial order, devised after an adversarial hearing at which the facts are examined and the line between protected and unprotected speech is carefully determined, and which is subject to immediate appellate review, is more protective of free speech than is a broadly worded rule, sharply focused on specific speakers, the validity of which is not examined until it is too late for the speaker to adapt his comments to the law. While a judicially imposed prior restraint may "freeze" the speech which it prohibits, it also implicitly declares all unrestrained speech to be protected. Professional rules, on the other hand, chill all speech to which they might apply and do not offer a judicial determination until after the process of self-censorship has been completed.

Consequently, an order by the trial court, judiciously used, can provide precisely the "authoritative guide to the permissible scope of comment," *Bridges, supra*, at 269, which properly balances the dual goals of informing the public about the trial and protecting against excessive risk of community bias. In contrast, broadly worded professional rules present an almost insurmountable incentive to all but the most courageous of attorneys to err on the side of silence. Thus, professional rules are not, in fact, a scheme of subsequent punishment but, because of their narrow focus on a particular category of potential speakers who risk professional standing, reputation and livelihood, are a particularly undesirable form of prior censorship. This difficulty is compounded by the generality of language, which forces its target to engage in self-censorship to an extent much greater than that which might be required by "the particular circumstances of the particular case." *Pennekamp, supra*, at 367 (Frankfurter, J., concurring). The precisely drawn prior restraint is likely to "chill" less information than is a

broad professional regulation and thus better serves the twin goals of trial fairness and public oversight of the judicial system.

CONCLUSION

Professional ethical proscriptions on the speech of criminal defense attorneys involved in pending litigation infringe on important first amendment interests, including the recognized right of society to learn about particular trials and the workings of the criminal justice system, the right of attorneys to discuss that system and engage in political speech, and the right of the accused to choose a spokesman in his or her behalf. As such, they can be justified only if they are narrowly drawn to serve, empirically connected to, and the least restrictive means of achieving the compelling interest in fair trials. Currently existing rules satisfy none of these requirements and should be rejected.

Respectfully submitted,

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